Supreme Court
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No. OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

JAMES W. FUHRMAN,
INTELLIGENCE SPECIALIST FIRST CLASS,
UNITED STATES NAVY
Petitioner,
v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Military Rule of Evidence 505(h) does not provide for reciprocal discovery, as only the defense is required to disclose classified information it intends to use at courts-martial. The civilian counterpart to M.R.E. 505, the Classified Information Procedures Act, 18 U.S.C. Appx. § 6(f) (2006), provides that when the court authorizes the defendant to disclose classified information, the court shall direct the government to provide the accused with any information it expects to use to rebut the classified information. The question presented is:

1. Whether Military Rule of Evidence 505 is facially unconstitutional because it does not provide for reciprocal discovery as required by *Wardius v. Oregon*, 412 U.S. 470 (1973).

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The principal opinion of the Court of Appeals for the Armed Forces is *United States v. Fuhrman*, __ M.J. __, No. 06-0734, slip op. at 1 (C.A.A.F. February 20, 2007). App. A, *infra*, at 1a. The principal opinion of the Navy-Marine Corps Court of Criminal Appeals is *United States v. Fuhrman* and can be found at 2006 CCA LEXIS 106 (N-M.Ct.Crim.App. 2006) (unpublished opinion). App. B, *infra* at 2a.

JURISDICTION

The Court of Appeals for the Armed Forces granted review of Petitioner's case and affirmed his conviction on February 20, 2007. This Court's jurisdiction is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution reads, in part:

> No person ... shall be compelled in any criminal case to be a witness against himself nor be deprived of life, liberty, or property, without due process of law....

18 U.S.C. Appx. § 6(f) (2006) is reproduced at App. C, *infra*, at 12a.

STATEMENT

This case raises important, recurring questions relating to the lack of reciprocal discovery in Military Rule of Evidence 505. This rule governs reciprocal discovery of classified information and was added to the Manual for Courts-Martial in 1983. Military Rule of Evidence 505 provides that the defense must disclose classified information that it intends to use at courts-martial. Military Rule of Evidence 505 is based on the Classified Information Procedures Act, 18 U.S.C. Appx. § 6(f) (2006) provides that when the court authorizes the defendant to disclose classified information, the court shall direct the government to provide the accused with any information it expects to use to rebut the classified information.

Military Rule of Evidence 505 is based upon H.R. 4745, 96th Cong., 1st Sess. (1979) which was proposed by the executive branch in response to the "graymail" problem, that being when a defendant in a criminal case seeks disclosure of sensitive national security information, the release of which may force the government to discontinue the prosecution. ANALYSIS OF THE MILITARY RULES OF EVIDENCE: RULE 505 CLASSIFIED INFORMATION, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.), Appendix 22 at 40.

The Rule is also based upon the Supreme Court's discussion of executive privilege in *United States v. Reynolds*, 345, U.S. 1 (1953) and *United States v. Nixon*, 418 U.S. 683 (1974). *Id.* Section (h) of the Rule deals with the provision at issue in this case. Section (h) is derived from section 5 of H.R. 4745, the intent of which is to prevent disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information. ANALYSIS OF M.R.E. 505 at 41.

The President amended section (h) in 1993 in order to provide more specificity in detailing the items that the defense intended to introduce pursuant to *United States v. Collins*, 720 F.2d. 1195 (11th Cir. 1983).

The Classified Information Procedures Act (CIPA) grew out of a different House bill introduced on the same day as H.R. 4745. H.R. 4736, 96th Cong., 1st Sess. (1979). H.R. 4736 was amended twice before enactment as S. 1482 (Public Law 96-456 (1980)). The reciprocal discovery provision was added specifically to address Due Process concerns. H. Rep. No. 831, 96th Cong., 2d Sess., pt. 1 at 23 (1980).

The lower court found that Military Rule of Evidence 505 adequately protects an accused from government overreaching, citing M.R.E. 505(i)(4)(E). *United States v. Fuhrman*, 2006 CCA LEXIS at *12. The Court of Appeals for the Armed Forces summarily affirmed the lower court on February 20, 2007. *United States v. Fuhrman*, __ M.J. __, No. 06-0734, slip op. at 1 (C.A.A.F. February 20, 2007).

The Court of Appeals for the Armed Forces' affirmation of the lower court's decision is at odds with the holdings of other federal courts that have addressed challenges to CIPA and focused on the importance of reciprocal discovery to ensuring Due Process for criminal defendants; *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324 (D.N.M. 2000) and *United States v. Clyde*, 1993 U.S. Dist. LEXIS 13572.

The Lower Court's Decision

The lower court citied the military judge's ability to impose various sanctions up to and including dismissing charges with prejudice if the Government objects to disclosure of classified material that the military judge

determines must be disclosed in the interests of justice pursuant to M.R.E. 505(i)(4)(E). *Fuhrman*, 2006 CCA LEXIS 106 at *12-13. This logic does not address an accused's Due Process concerns, it only provides a mechanism by which an accused can force disclosure of classified material that the military judge deems must be disclosed in the "interests of justice."

The lower court noted that classified information will be disclosed when the military judge determines such information is relevant and necessary to an element of an offense or a legally cognizable defense. *Id.* at 13. The lower court held that these requirements "adequately protect a defendant's right to a level playing field." *Id.* The Court of Appeals for the Armed Forces summarily affirmed the decision. *United States v. Fuhrman*, __ M.J. ___, No. 06-0734, slip op. at 1 (C.A.A.F. February 20, 2007).

REASONS FOR GRANTING THE PETITION

The decision below creates a conflict between military and civilian courts as to whether the government is required to disclose classified information it intends to use in order to convict an accused. The lower court's willingness to deem Military Rule of Evidence 505(i) sufficient to protect the Due Process rights of a military accused has put military courts squarely at odds with their civilian counterparts. Due to this conflict, similarly situated civilian and military accused have substantially different Due Process protections without an articulated rationale. Further, the lower courts' decisions conflict with the relevant decision of this Court. Only this Court can resolve this conflict. Absent review by this Court, the military convictions of those servicemembers who have been convicted without entitlement to reciprocal discovery will be final.

I.

The Court of Appeals' Affirmation of the Lower Court's Decision was in Error Because Military Rule of Evidence 505 is Unconstitutional on its Face.

During a classified portion of Appellant's trial, trial defense counsel complained that he was being required to disclose his entire defense to the government and that the Untied States did not have to do the same. Record at 975. The situation of which Appellant complained at trial was sanctioned by Military Rule of Evidence 505. Military Rule of Evidence 505(h) requires the defense to inform the Untied States that it intends to disclose classified information at courts-martial. The civilian counterpart to M.R.E. 505, the Classified Information Procedures Act (CIPA), also provides that when the court authorizes the defendant to disclose classified information, the court shall direct the government to provide the accused with any information it expects to use to rebut the classified information. 18 U.S.C. Appx. § 6(f) (2006). While Military Rule of Evidence 505 largely mirrors the CIPA, it does not mirror the CIPA's required reciprocal discovery obligation.

The legislative history of CIPA makes clear that Congress included the reciprocal discovery provision in the law because of concerns that due process required it. H. Rep. No. 831, 96th Cong., 2d Sess., pt. 1 at 23 (1980). This also conforms to the general practice that, when the defense is required to disclose evidence it intends to use at trial, the government is required to disclose the evidence it will offer in rebuttal. RULE FOR COURTS-MARTIAL 701(A)(3)(B), MANUAL FOR COURTS-MARTIAL, UNITED STATES (2005 ed.).

In *Wardius v. Oregon*, 412 U.S. 470 (1973), this Court struck down an Oregon law that did not provide for reciprocal discovery after the defense gave notice of its intent to use alibi witnesses. The Court held "due process of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." *Wardius*, 412 U.S. at 472. "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." *Wardius*, 412 U.S. at 476.

While courts have found the notice requirements of the CIPA to be constitutionally sound, they have done so only because the government was also required to disclose what information it intended to use during rebuttal. *United States v. Collins*, 720 F.2d 1195, 1200 (11th Cir. 1983); *United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 719 *19 (S.D.N.Y. 2001). "CIPA's burdens are not one-sided." *Bin Laden*, 2001 U.S. Dist. LEXIS 719 at 19. The lower court concluded that Military Rule of Evidence 505 "adequately protects a defendant's right to a level playing field." *Fuhrman*, 2006 CCA LEXIS 106 at *12. But the reciprocal discovery provisions contained in Section 6 of the CIPA have been important to judicial determinations that CIPA does not tip the balance of discovery against defendants and in favor of the government. *United States v. Wen Ho Lee*, 90 F. Supp. 2d 1324, 1329 (D.N.M. 2000); see also *United States v. Clyde*, 1993 U.S. Dist. LEXIS 13572 (E.D.P.A. 1993). By contrast, M.R.E. 505 is one-sided and deprives servicemembers of Due Process.

II.

The Lower Court has Decided the Important Question of Whether Military Rule of Evidence 505 Violates a Servicemember's Due Process in a Way That Conflicts with Relevant Decisions of this Court.

The lower court held that Military Rule of Evidence, without a reciprocal discovery mandate, "adequately protects a defendant's right to a level playing field." *Fuhrman*, 2006 CCA LEXIS 106 at *13. The lower court's decision conflicts with relevant decisions of this Court. In *Wardius v. Oregon*, 412 U.S. 470 (1973), the Supreme Court struck down an Oregon law that did not provide for reciprocal discovery after the defense gave notice of its intent to use alibi witnesses. The Court held "due process of the Fourteenth Amendment forbids enforcement of alibi rules unless reciprocal discovery rights are given to criminal defendants." *Wardius*, 412 U.S. at 472. "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." *Wardius*, 412 U.S. at 476.

Contrary to the holding of the lower court, the jurisprudence of this Court indicates that there is a Due Process right to reciprocal discovery. It has long been held that "our citizens in uniform may not be stripped of basic rights simply because they have doffed their civilian clothes." Earl Warren, *The Bill of Rights and the Military*, 37 N.Y.U.L. Rev. 181, 188 (1962). The lower court's decision that Military Rule of Evidence 505 sufficiently protects a servicemember's Due Process rights is in conflict with *Wardius* and thus cannot stand. There is no

legitimate basis for the discrepancy between the two statutes.

III.

The Lower Court's Decision is Incorrect.

While courts have found the notice requirements of the CIPA to be constitutionally sound, they have done so only because the government was also required to disclose what information it intended to use during rebuttal. *United States v. Collins*, 720 F.2d 1195, 1200 (11th Cir. 1983); *United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 719 *19 (S.D.N.Y. 2001). The lower court failed to address the lack of this requirement, instead relying on potential penalties imposed by a military judge when the government objects to disclosure. What has saved the CIPA should also be what saves M.R.E. 505 – reciprocal disclosure. Neither CIPA's nor M.R.E. 505's burdens should be one sided. See *Bin Laden*, 2001 U.S. Dist. LEXIS 719 at 19.

More importantly, the lower court failed to address *Wardius*. "It is fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the state." *Wardius*, 412 U.S. at 476.

The lower court's determination that judicial sanctions for the government's refusal to disclose relevant classified information sufficiently provide a "level playing field" is erroneous and only action by this Court will redress this Due Process violation.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

UNITED STATES, Appellee v.
James W. FURHMAN,
Intelligence Specialist First Class,
United States Navy, Appellant

No. 06-0734/NA

UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

February 20, 2007, Decided

On consideration of the petition for grant of review of the decision of the United States Navy-Marine Corps Court of Criminal Appeals, it is, by the Court, this 20th day of February, 2007,

ORDERED:

That said petition is hereby granted; and, That the decision of the United States Navy-Marine Corps Court of Criminal Appeals is affirmed.

For the Court,

William A. DeCicco
Clerk of the Court

Appendix B

IN THE U.S. NAVY-
MARINE CORPS COURT OF CRIMINAL APPEALS
WASHINGTON NAVY YARD
WASHINGTON, D.C.

BEFORE

J.W. ROLPH **W.L. RITTER** **E.E. GEISER**

UNITED STATES

v.

James W. FUHRMAN
Intelligence Specialist First Class (E-6), U. S. Navy

NMCCA 200200494 Decided 10 May 2006

Sentence adjudged 8 June 2000. Military Judge: K.J. Allred.
Review pursuant to Article 66(c), UCMJ, of General Court-Martial convened by Commander, U.S. Naval Forces, Korea.

LT BRIAN MIZER, JAGC, USNR, Appellate Defense Counsel
LT KATHLEEN A. HELMANN, JAGC, USNR, Appellate Government Counsel

AS AN UNPUBLISHED DECISION, THIS OPINION DOES NOT SERVE AS PRECEDENT.

GEISER, Judge:

A military judge sitting as a general court-martial found the appellant guilty, consistent with his pleas, of mishandling classified material, two specifications of murder, and obstruction of justice in violation of Articles 92, 118, and 134, Uniform Code of Military Justice, 10 U.S.C. 892, 918, and 934. The appellant was sentenced to a dishonorable discharge, life imprisonment, total forfeiture of pay and allowances, and reduction to pay grade E-1. The convening authority approved the sentence as adjudged but suspended confinement in excess of 50 years.

The appellant raises five assignments of error. First, the appellant asserts that the record of trial is substantially incomplete. Second, he avers that the military judge improperly considered life without parole as an authorized punishment. Third, he argues that his plea to obstruction of justice was improvident. Fourth, the appellant asserts that he has been denied speedy post-trial review. Fifth, the appellant claims that he was denied due process at trial when he was compelled to identify to the Government specific classified information he intended to present at trial when the Government did not have a reciprocal duty to disclose potential rebuttal evidence. We have examined the record of trial, the various assignments of error, the Government's responses, and the appellant's reply. We conclude that the findings and sentence are correct in law and fact and that no error was committed that was materially prejudicial to the substantial rights of the appellant. Arts. 59(a) and 66(c), UCMJ.

Incomplete Record of Trial

The appellant contends that the record of trial is incomplete. Specifically, he claims that pages 939-988 of

the transcript, Prosecution Exhibits 22 and 23, and several portions of the Article 32 hearing are missing from the record of trial. The appellant acknowledges, however, that the "missing" transcript pages are classified and have been available for review by appellate counsel in a sensitive compartmented information facility (SCIF) on board Washington Navy Yard. The SCIF is physically located on the second floor of the same building in which the Appellate Government Division, the Appellate Defense Division, and this court are housed. In a subsequent submission to this court, the appellant's counsel acknowledges that he has had an opportunity to review the "missing" transcript pages.

With respect to Prosecution Exhibits 22 and 23, the appellant correctly notes that there are no documents in the unclassified record of trial or in the classified portion of the record held in the SCIF marked as Prosecution Exhibits 22 and 23. The SCIF does, however, contain 21 classified documents that are styled as attachments to exhibit C-1. The record of trial specifically identifies the enclosures to exhibit C-1 as the 7 classified documents seized from the appellant's jacket pursuant to his apprehension and the 14 classified documents seized from the appellant's household goods shipment. When initially marked, exhibit C-1 was being considered in the context of a MILITARY RULE OF EVIDENCE 505, MANUAL FOR COURTS-MARTIAL, UNITED STATES (2000 ed.), motion. Record at 939-40.

The Government submitted a declaration from the lead trial counsel in the instant case, Lieutenant Commander (LCDR) Todd Huntley, JAGC, U.S. Navy. LCDR Huntley confirms that exhibit C-1 referenced above does, in fact, contain the 21 classified documents addressed in Charge I. He notes that following the appellant's pleas of

guilty, the military judge secured the appellant's agreement that the court could consider the 21 classified documents as matters in aggravation. The documents were referred to as Prosecution Exhibits 22 and 23 and were clearly identified by the military judge as the documents reviewed and discussed during the prior classified Article 39a, UCMJ, session referenced above. The exhibits were apparently never properly remarked. Record at 2030-31, LCDR Huntley declaration of 13 Dec 2005.

The appellant, while contesting that the 21 classified documents are, in fact, Prosecution Exhibits 22 and 23, acknowledges having had an opportunity to review said documents. This court finds that the documents, styled as exhibit C-1, held in the Washington Navy Yard SCIF, are Prosecution Exhibits 22 and 23. With respect to the missing documents from the Article 32, UCMJ, hearing, the Government correctly notes that there is no legal requirement that the contested investigation documents be included in the record of trial. We, therefore, find that the record of trial is complete and decline to grant relief on this assignment of error.

Life Without Possibility of Parole

The appellant next contends that the military judge erred when he improperly considered a punishment of life without possibility of parole as an authorized punishment in the appellant's case. While the appellant acknowledges that he was not awarded this punishment, he nonetheless asserts that he was prejudiced because the military judge "clearly intended to sentence the Appellant to less than the maximum punishment." Appellant's Brief of 2 Sep 2004 at 15. We do not agree.

The appellant's speculation about possible prejudice based on what he perceives the military judge intended to do is without evidentiary basis. The military judge and counsel expressly discussed the applicability of a punishment of confinement for life without possibility of parole. The trial defense counsel noted that, while he was waiving his motion regarding the legal maximum punishment pursuant to the pretrial agreement, the issue could resurface on appeal should the military judge award a sentence including life without parole. Record at 1972-74. The necessary although unspoken implication of the defense statement is that they perceived no prejudice to the appellant unless the military judge, in fact, awarded a sentence including life without parole. We independently discern no prejudice to the appellant and decline to grant relief for this assignment of error. Given that we find no prejudice, we need not reach the appellant's contention that an existing sentencing provision of the MANUAL FOR COURTS-MARTIAL, UNITED STATES (1998 ed.) automatically limits a subsequent congressional increase to the maximum authorized punishment for an offense under the Uniform Code of Military Justice.

Improvident Plea to Obstruction of Justice

The appellant asserts that his plea to Charge III (obstruction of justice) was improvident because the actions described by the appellant during the providence inquiry reflected a desire to avoid detection as opposed to a desire to obstruct justice. The appellant states that at the time he burned the bodies of his wife and son, he had no reason to believe there were or would be criminal proceedings pending against him. Appellant's Brief at 18.

In order to reject a guilty plea on appellate review,

the record must show a substantial basis in law and fact for questioning the plea. *United States v. Irvin*, 60 M.J. 23, 24 (C.A.A.F 2004)(citing *United States v. Jordan*, 57 M.J. 236, 238 (C.A.A.F. 2002)). In order to sustain an obstruction of justice charge, there is no requirement that criminal proceedings actually have commenced. It is enough that the appellant had reason to believe that such proceedings would be commenced. *United States v. Gussen*, 33 M.J. 736, 738 (A.C.M.R. 1991). Each instance of alleged obstruction of justice must be resolved on a case-by-case basis, considering the specific facts surrounding the alleged obstruction. *See United States v. Finsel*, 36 M.J. 441 (C.M.A. 1993).

Under the specific circumstances of this case, we find that the appellant's articulated actions in washing and dressing his boy, loading the bodies in his vehicle, driving around town looking for a suitable spot to destroy the bodies, his actual destruction of the bodies and his subsequent statements to investigators, command members, and friends that he was bewildered about where his wife and child might have gone, suggests far more thought and planning than the panicked reaction evident in the case of *United States v. Housley*, No. 9701456, 1998 CCA LEXIS 486, unpublished op. (N.M.Ct.Crim.App. 4 Dec 1998) cited by the appellant. On the contrary, the appellant's actions were calculated and methodical. We find that there is no substantial basis in law and fact to question the appellant's plea of guilty to Charge III.

Speedy Post-Trial Review

The appellant asserts that a delay of 1,797 days from the date sentence was announced to the date the appellant filed this supplemental assignment of error on 11

May 2005[1] is excessive. We have carefully considered the record of trial, the assignment of error regarding post-trial processing delay, and the Government's answer. We consider four factors in determining if post-trial delay violates appellant's due process rights:
(1) length of the delay; (2) reasons for the delay; (3) appellant's assertion of the right to a timely appeal; and (4) prejudice to the appellant. *United States v. Jones*, 61 M.J. 80, 83 (C.A.A.F. 2005)(citing *Toohey v. United States,* 60 M.J. 100, 102 (C.A.A.F. 2004)). If the length of the delay is not unreasonable, further inquiry is not necessary. If we conclude that the length of the delay is "facially unreasonable," however, we must balance the length of the delay against the other three factors. *Id.*

In the instant case, there was a delay of about 1,797 days from the date of sentencing to the date the appellant raised this assignment of error. We find this unexplained delay of almost five years to be facially unreasonable, triggering a due process review.

We balanced the length of delay in this case in the context of the three remaining *Jones* factors. Regarding the second factor, reasons for the delay, the Government points to the complicated nature of the charges, the length of his trial, and the lengthy - 2609 page - record of trial. With respect to the third factor, we find no evidence that appellant asserted his right to timely post-trial review any time prior to filing his opposition to the Government's request for an enlargement of time. Finally, regarding the

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[1] The appellant first raised the issue of speedy post-trial review in a written "Opposition to Government's Fourth Enlargement of Time" filed with this court on 4 March 2005.

fourth factor, the appellant asserts that the "missing" portions of the record of trial make his incarceration "oppressive" in that an incomplete record will support no more than 6 months confinement. Appellant's Supplemental Brief of 11 May 2005 at 4. We find the appellant's claim of prejudice unpersuasive. We find no evidence of material prejudice to the appellant's substantial rights resulting from post-trial delay in this case. Considering all four factors, we conclude that there has been no due process violation due to post-trial delay.

We are also aware of our authority to grant relief under Article 66, UCMJ. *Toohey*, 60 M.J. at 103; *Diaz v. Judge Advocate General of the Navy*, 59 M.J. 34, 37 (C.A.A.F. 2003); *United States v. Tardif*, 57 M.J. 219, 224 (C.A.A.F 2002). Considering the factors we articulated in *United States v. Brown*, 62 M.J. 602 (N.M.Ct.Crim. App. 2005)(en banc), we decline to do so.

Denial of Due Process

The appellant also argues that he was denied constitutional due process when, during pretrial motions, he was required by the military judge, under MIL. R. EVID. 505, to disclose what specific classified material the defense potentially intended to introduce while the Government had no comparable disclosure requirement. A presumption exists that a rule of evidence is constitutional unless a lack of constitutionality is clearly and unmistakably shown. To prevail, the appellant must demonstrate that MIL. R. EVID. 505 violates a fundamental principle of justice, *United States v. Wright*, 53 M.J. 476, 481 (C.A.A.F 2000)(quoting *Montana v. Egelhoff*, 518 U.S. 37, 43-45 (1996)) and that no set of circumstances exist under which the rule would be valid. *United States v.*

Salerno, 481 U.S. 739, 745 (1987).

The gravamen of the appellant's argument is that application of MIL. R. EVID. 505 would have, in the instant case, required him to "disclose his entire defense to the government" and that the government had no similar disclosure requirement. Appellant's Supplemental Brief of 12 Oct 2005 at 1. We do not agree with this broad assessment. MIL. R. EVID. 505 does not require that the defense reveal their trial strategy; rather, it only requires that the accused identify whatever classified information he or she plans to use at trial. *United States v. Bin Laden*, 2001 U.S. Dist. LEXIS 719 (S.D.N.Y. 2001). The intent behind these disclosure requirements in MIL. R. EVID. 505 "is to prevent disclosure of classified information by the defense until the government has had an opportunity to determine what position to take concerning the possible disclosure of that information." (*See* Analysis to MIL. R. EVID. 505(h)). The Government's interest in protecting classified materials has withstood constitutional challenge. *Schmidt v. Boone*, 59 M.J. 841, 855 (A.F.Ct.Crim.App. 2004).

MIL. R. EVID. 505 adequately protects the appellant from government overreaching. The military judge is authorized to impose various sanctions up to and including dismissing charges with prejudice if the Government objects to disclosure of classified material that the military judge determines must be disclosed in the interests of justice. MIL. R. EVID. 505(i)
(4)(E). Classified information will be disclosed when the military judge determines such information is relevant and necessary to an element of an offense or a legally cognizable defense. *United States v. Lonetree*, 31 M.J. 849, 856 (N.M.C.M.R. 1990). These requirements adequately

protect a defendant's right to a level playing field. We find, therefore, that MIL. R. EVID. 505 is neither facially unconstitutional nor, given the appellant's pleas of guilty, was it unconstitutional in application in this case.

Conclusion

We affirm the findings and the sentence approved by the convening authority.

Chief Judge ROLPH and Senior Judge RITTER concur.

For the Court

R.H. TROIDL
Clerk of Court

Appendix C

18 U.S.C. Appx. § 6(f)

(f) Reciprocity.— Whenever the court determines pursuant to subsection (a) that classified information may be disclosed in connection with a trial or pretrial proceeding, the court shall, unless the interests of fairness do not so require, order the United States to provide the defendant with the information it expects to use to rebut the classified information. The court may place the United States under a continuing duty to disclose such rebuttal information. If the United States fails to comply with its obligation under this subsection, the court may exclude any evidence not made the subject of a required disclosure and may prohibit the examination by the United States of any witness with respect to such information.